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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. NATHANIEL EDUARDO CAÑEZ, Appellant.	2 CA-CR 2011-0172 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093519001

Honorable Christopher Browning, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Nathaniel Cañez was convicted of drive-by shooting and three counts of aggravated assault. On appeal, Cañez argues the trial court erred by permitting the state to amend the indictment for drive-by shooting, admitting other act evidence, and imposing an illegal sentence. He also contends insufficient evidence supported one of his convictions for aggravated assault. Because we find no reversible error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Cañez drove a car with three passengers into a parking lot of an apartment complex where the victims, N. and M., "were hanging out." N. saw one of the passengers approach a car and pull on locked door handles. When N. asked the driver what was going on, one of the passengers said they were going to "jack some rims, jack some cars, break into vehicles." Cañez tried to get out of the car and N. pushed the door closed and told him they "didn't want no problems." Cañez told a passenger to give him a gun and then shot N. twice. N. and M. ran and hid behind a truck. Cañez fired three or four more shots at them and then drove away. Police officers later found and arrested Cañez.

¶3 Cañez was charged with drive-by shooting, three counts of aggravated assault, and attempted second-degree murder. After the state rested its case, the trial court found substantial evidence did not support the second-degree murder charge and dismissed it pursuant to Rule 20, Ariz. R. Crim. P. The jury found Cañez guilty of the

other charges. The court sentenced him to concurrent and consecutive sentences totaling twenty-six years' imprisonment. This appeal followed.

Indictment

¶4 Cañez first argues the trial court erred by permitting the state to amend the indictment from charging him with drive-by shooting at an occupied motor vehicle to drive-by shooting at a person, another occupied motor vehicle or an occupied structure. He contends that the indictment could not be amended properly under Rule 13.5(b), Ariz. R. Crim. P., and that the amendment prejudiced his ability to present a defense. We review a trial court's grant of a motion to amend an indictment for an abuse of discretion. *See State v. Johnson*, 198 Ariz. 245, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶5 Rule 13.5(b) permits an indictment "be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment." Such a defect must be raised in a motion no later than twenty days before trial. Ariz. R. Crim. P. 13.5(e), 16.1(b). Rule 13.5(b) also provides that the indictment will be "deemed amended to conform to the evidence" presented at any court proceeding. Ariz. R. Crim. P. 13.5(b). A defect is formal or technical if the amendment does not prejudice the defendant or change the nature of the charged offense. *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). However, an amendment that alters the elements of the charged offense and does not serve to correct a mistake of fact or remedy a formal or technical defect in the indictment is not authorized under Rule 13.5(b). *State v. Freeney*, 223 Ariz. 110, ¶¶ 16-20, 219 P.3d 1039, 1042 (2009).

¶6 Under A.R.S. § 13-1209(A), "[a] person commits drive by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure." We have held that an indictment charging a defendant with shooting at a particular person has a distinct element from an indictment charging a defendant with shooting at an occupied structure or another person. *State v. Rivera*, 226 Ariz. 325, ¶¶ 4-5, 8, 247 P.3d 560, 562-63 (App. 2011). Here, shooting at another occupied vehicle as charged is a distinct act from shooting at another person. And the state has not alleged it mistakenly charged Cañez with shooting at an occupied vehicle in the indictment. We conclude therefore that this amendment changed the nature of the offense and was not permitted by Rule 13.5.

¶7 But we will not reverse a conviction for a violation of Rule 13.5 if the error is harmless. *Freeney*, 223 Ariz. 110, ¶ 26, 219 P.3d at 1043. And "an error 'is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.'" *State v. Sprang*, 227 Ariz. 10, ¶ 15, 251 P.3d 389, 393 (App. 2011), *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶8 Here, both parties were aware of the evidence against Cañez. *Cf. State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 36, 228 P.3d 909, 923 (App. 2010) (in determining sufficiency of notice, court considers indictment in light of facts known to parties). The only evidence of Cañez shooting at the victims indicates he shot at them as they were standing next to his vehicle, running away, or hiding behind a vehicle. And in his opening statement, Cañez conceded that after one of the victims pushed Cañez's car

door closed, the jury would "probably find that Nathen Ca[ñ]ez rapidly shot his pistol four times."

¶9 Additionally, prejudice in this context means that lack of knowledge of the nature of the charge impedes the defendant's ability to defend himself. *See State v. Lehr*, 227 Ariz. 140, ¶ 70, 254 P.3d 379, 393 (2011); *see also Freeney*, 223 Ariz. 110, ¶ 28, 219 P.3d at 1044 (no prejudice when amendment did not affect "litigation strategy, trial preparation, examination of witnesses, or argument"). In considering whether to grant the amendment, the trial court asked Cañez to identify how he was prejudiced by the amendment and how the defense strategy would have been different if the indictment had originally charged him with shooting at a person. Cañez did not identify anything he would have done differently or how he would have altered his strategy. Cañez asserts on appeal that, although he generally argued he was acting in self-defense, on the drive-by shooting charge "he specifically defended that [the victims] were not inside the pickup truck and therefore [he] could not be found guilty of that particular charge." However, Cañez does not provide any citation to the record supporting this statement and he did not make any such argument in his opening statement. Moreover, being found guilty of the amended offense is not the prejudice required here. *See Lehr*, 227 Ariz. 140, ¶ 70, 254 P.3d at 393. Because Cañez had notice of the offense ultimately charged based on the facts known to both parties and because he has not shown that he would have altered his defense, we conclude any error was harmless. *See Sprang*, 227 Ariz. 10, ¶ 15, 251 P.3d at 393.

¶10 Cañez further alleges that "because at least one of the bullets was never found, Cañez had to be concerned with defending against all possible 'occupied structures' such as the nearby school and apartment building." However, the jury instructions defined drive-by shooting as "intentionally discharging a weapon from a motor vehicle at another person." On the verdict form the jury found unanimously that the victims of the drive-by shooting were N. and M. We presume the jury follows its instructions, *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996), and Cañez was not required to defend himself against drive-by shooting at any occupied structures. And having to defend against other possible crimes is not the type of prejudice which would require his conviction be vacated. *See Lehr*, 227 Ariz. 140, ¶ 70, 254 P.3d at 393.

¶11 Cañez relies on *Rivera*, 226 Ariz. 325, 247 P.3d 560, to support his argument. In *Rivera*, we considered the sufficiency of the evidence to support a conviction for an offense charged in an indictment, when the indictment was not amended, and the charge was carried through to the verdict form. 226 Ariz. 325, ¶¶ 3-9, 247 P.3d at 562-64. Here, the indictment was amended and the verdict form was correct.

¶12 To the extent Cañez asserts the amendment violated his "constitutional right to receive notice of the charges against him," we note that our supreme court has held the same factors that make a violation of Rule 13.5 harmless may indicate a defendant had sufficient notice of the charges against him under the Sixth Amendment. *Freeney*, 223 Ariz. 110, ¶¶ 29-30, 219 P.3d at 1044. As we have discussed, Cañez had notice of the charges against him based on the facts available to both parties. *See Far W.*

Water & Sewer Inc., 224 Ariz. 173, ¶ 36, 228 P.3d at 923. The amendment of the indictment did not violate his Sixth Amendment rights.

Sufficiency of the Evidence

¶13 Cañez next contends insufficient evidence supported his conviction for aggravated assault of M., because no evidence showed he was aware of M.'s presence or intended to place M. in reasonable apprehension of physical injury. We examine the sufficiency of the evidence to determine whether substantial evidence supports the jury's verdict. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005).

¶14 "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence "may be either circumstantial or direct." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). Aggravated assault with a deadly weapon may be shown by evidence of "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury" while using a deadly weapon. A.R.S. §§ 13-1203(A)(2); 13-1204(A)(2).[1]

[1]Although § 13-1204 has been amended since the time of Cañez's offense, because the relevant portions of the statute remain the same we refer to the current statute. *Compare* § 13-1204(A)(2) *with* 2008 Ariz. Sess. Laws, ch. 301, § 52.

¶15 N. testified that while he had been within a few feet of the car Cañez was in, talking with Cañez, M. had been about five feet to his left. He further testified that after M. and he ran and hid behind a truck, Cañez continued to fire "trying to shoot [N.] or [M.]" M. testified that the two victims originally had been five feet away from Cañez's car, but then came closer both standing "shoulder to shoulder." M. also testified that both he and N. had been "telling [Cañez] okay, there is no need for violence."

¶16 The jury reasonably could have concluded Cañez realized M. was present based on evidence M. had been next to N. and within five feet of the car, and also evidence M. had spoken to Cañez. It also could have concluded that Cañez continued to be aware of M.'s presence when he shot in the direction of both men as they hid behind the truck and that he intended to place M. in apprehension of imminent physical injury. Substantial evidence supports the jury's verdict finding Cañez guilty of aggravated assault of M.[2] *See Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913.

Other Act Evidence

¶17 Cañez further argues the trial court erred by admitting evidence of telephone calls he made from jail to his family about having P., a witness to the shooting, killed. He contends the statements were irrelevant, inadmissible under Rules 403 and 404, Ariz. R. Evid., and violated his constitutional rights to due process and a fair trial.

[2]Because we find there was substantial evidence of Cañez's intent for purposes of aggravated assault, we need not address Cañez's argument that "transferred intent . . . does not save" the aggravated assault conviction.

¶18 We review the trial court's rulings on the relevance and admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003). However, when a defendant has failed to object to an alleged error in the trial court, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We will affirm the trial court's ruling if it is correct for any reason. *State v. Dean*, 226 Ariz. 47, n.6, 243 P.3d 1029, 1036 n.6 (App. 2010).

¶19 Relevant evidence is evidence with any tendency to make a fact of consequence more or less probable and is admissible unless otherwise prohibited. Ariz. R. Evid. 401, 402.[3] Evidence of other acts is not admissible to establish a person's character or "show action in conformity therewith," but may be admitted "for other purposes." Ariz. R. Evid. 404(b). Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403.

¶20 Certain other acts or crimes may be admitted to indicate a defendant's consciousness of guilt. *State v. Jeffers*, 135 Ariz. 404, 415, 661 P.2d 1105, 1116 (1983) (escape from incarceration admissible to show consciousness of guilt). "Evidence that a criminal defendant sought to suppress evidence adversely affecting him is relevant to show a consciousness of guilt." *State v. Williams*, 183 Ariz. 368, 375, 904 P.2d 437, 444

[3]Although the rules of evidence have been amended since Cañez's trial, the amendments were intended to be stylistic only. Ariz. R. Evid. 401 cmt. Thus, we will refer to the current rules.

(1995). In *Williams*, our supreme court found evidence the defendant shot a victim relevant to an earlier murder because the jury reasonably could infer he shot the second victim "to attempt to silence her." *Id.* at 376, 904 P.2d at 445. It held the possibility of other explanations was an issue of the weight of the evidence rather than admissibility. *Id.*

¶21 Prior to opening statements, Cañez argued the telephone calls were not relevant and were inadmissible under Rule 404(b).[4] The trial court deferred its ruling but ordered the calls not be mentioned in the opening statements. During trial, Cañez further objected based on Rules 402, 403, and 404. Eventually, the court permitted a witness to testify to having listened to recorded calls in which Cañez told his father to tell another individual to "take . . . out" P. and told his mother "[i]t's game over for" P. He also testified Cañez told his girlfriend someone "had dropped a dime," meaning "snitched" on him, and that he wanted to "get [P.] off the map."

¶22 Here, the jury could reasonably have inferred that Cañez wanted P. killed[5] to prevent him from testifying about the shooting. Thus, the evidence is relevant under Rules 401 and 402 to show consciousness of guilt. *See Williams*, 183 Ariz. at 375, 904 P.2d at 444. Because the evidence is probative of Cañez's consciousness of guilt rather than of his character, it is for another purpose and not precluded under Rule 404(b). *See*

[4]Cañez also argued the state had failed to disclose the telephone calls prior to trial. On appeal he notes the same failure to disclose but does not present further argument on that issue. He therefore has waived any such argument on appeal. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2007).

[5]Neither party disputes that Cañez's statements concerned killing P.

Jeffers, 135 Ariz. at 415, 661 P.2d at 1116. And simply because evidence of the telephone calls was adverse to Cañez does not mean it was unduly prejudicial under Rule 403. *See State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (unfair prejudice is "'an undue tendency to suggest decision on an improper basis'"), *quoting* Fed. R. Evid. 403 advisory committee note. Instead the evidence was probative of Cañez's consciousness of guilt, which tended to rebut his argument that he fired in self-defense. *See id.*

¶23 Although Cañez argues the trial court erred by failing to give a limiting instruction, he does not identify how the jury's consideration of the evidence should have been limited. Presumably he is arguing the court should have instructed the jury not to consider the telephone calls as evidence of his character or a propensity for violence. Cañez concedes he did not request a limiting instruction in the trial court and argues the court's failure to give the instruction sua sponte constitutes fundamental error. But the jury instructions required the jury find Cañez guilty of every element of the offenses and required each verdict be decided separately based on whether the state had proved the charge. *Cf. State v. Hargrave*, 225 Ariz. 1, ¶¶ 23-24, 234 P.3d 569, 578 (2010). Moreover, courts repeatedly have held that a court's failure to give a limiting instruction on other act evidence sua sponte is not fundamental error. *See State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996); *State v. Taylor*, 127 Ariz. 527, 531, 622 P.2d 474, 478 (1980); *State v. Miles*, 211 Ariz. 475, ¶ 31, 123 P.3d 669, 677 (App. 2005).

¶24 Cañez concedes he failed to object based on constitutional grounds and has waived review on that basis for all but fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. However, he argues only that his rights to due process and a fair trial "protect [him] from introduction of improper character evidence." As we have determined, the evidence was admissible to show consciousness of guilt rather than Cañez's character and, thus, did not violate Cañez's constitutional rights. *Cf. State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997) (admission of other acts shown by clear and convincing evidence complies with due process). Because the evidence was properly admissible to show his consciousness of guilt and rebut his claim of self-defense, we need not address Cañez's argument that the evidence was not admissible as intrinsic to the offense. *See Dean*, 226 Ariz. 47, n.6, 243 P.3d at 1036 n.6.

Aggravating Factors at Sentencing

¶25 Cañez also contends the trial court erred by aggravating his sentence for drive-by shooting when the state had not filed a notice of aggravating factors before trial. We review the interpretation of a rule de novo. *Cranmer v. State*, 204 Ariz. 299, ¶ 8, 63 P.3d 1036, 1038 (App. 2003).

¶26 Arizona courts have held that aggravating factors need not be included in an indictment either in noncapital or capital cases. *State v. Aleman*, 210 Ariz. 232, ¶ 23 & n.7, 109 P.3d 571, 578 & n.7 (App. 2005). Even in capital cases, a defendant is only entitled to sufficient notice of aggravating factors to "'have a reasonable opportunity to prepare a rebuttal.'" *State v. Scott*, 177 Ariz. 131, 141-42, 865 P.2d 792, 802-03 (1993),

quoting State v. Ortiz, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981). And this court has held in considering petitions for review that notice of aggravating factors in the state's presentencing memorandum provided sufficient notice for due process, *State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998), and that the trial court did not err by sua sponte finding aggravating factors based on the record, *State v. Marquez*, 127 Ariz. 3, 5-6, 617 P.2d 787, 789-90 (App. 1980).

¶27 Here, Cañez had notice of the state's intent to use his prior conviction to enhance his sentence almost a year and one-half before his trial. He further had notice the state intended to allege aggravating factors more than five weeks before sentencing when the state filed a sentencing memorandum arguing the finding of the prior conviction allowed the court to find other aggravating circumstances as well. A week before sentencing, the trial court held a hearing on the motions. Even assuming a non-capital defendant is entitled to notice of aggravating factors, Cañez received sufficient notice.

¶28 Cañez contends Rules 13.5 and 16.1, Ariz. R. Crim. P., require the state provide notice of aggravating factors at least twenty days before trial. We first note that Cañez relies largely on cases concerning the notice requirement for sentence enhancement rather than aggravating factors. *See, e.g.*, *State v. Waggoner*, 144 Ariz. 237, 238-39, 697 P.2d 320, 321-22 (1985); *State v. Guytan*, 192 Ariz. 514, ¶ 28, 968 P.2d 587, 595 (App. 1998). These are inapplicable here.

¶29 Furthermore, Rules 13.5 and 16.1 permit the state to amend an indictment to include "an allegation of one or more prior convictions or other non-capital sentencing

allegations that must be found by a jury" at least twenty days before trial. However, neither the Sixth Amendment nor Arizona law requires a prior conviction be "found by a jury." A.R.S. § 13-701(D); *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). And when one aggravating factor has been established, the court may consider additional factors without presenting them to a jury. *Martinez*, 210 Ariz. 578, ¶ 27, 115 P.3d at 625-26. The state alleged before trial Cañez had a prior conviction for purposes of sentence enhancement. Once the court found the prior conviction to be an aggravating factor, the other factors did not require a jury's determination. Thus, Rule 13.5 does not apply and the trial court did not err in aggravating Cañez's conviction for drive-by shooting.

Consecutive Sentences

¶30 Cañez finally argues the trial court erred by imposing consecutive sentences for drive-by shooting and aggravated assault with a deadly weapon of M. We review de novo whether a trial court correctly imposed consecutive sentences pursuant to A.R.S. § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶31 Section 13-116 prohibits the imposition of consecutive sentences for offenses arising out of a single "act or omission." To determine whether conduct constitutes one act, we apply the three-part test from *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). First, we consider the facts of each crime and subtract from the factual transaction the evidence necessary to convict on the ultimate crime, the crime "that is at the essence of the factual nexus and that will often be the most serious of the

charges." *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. If the remaining evidence is sufficient to satisfy the elements of the other crime, then consecutive sentences may be imposed. *Id.* We then consider whether it was factually impossible to commit the more serious offense without also committing the less serious offense. *Id.* If that is the case, then it is more likely that the defendant committed a single act. *Id.* We last consider whether the defendant's conduct in committing the lesser offense "caused the victim to suffer an additional risk of harm beyond [the harm ordinarily] inherent in the ultimate crime." *Id.* If so, consecutive sentences may be imposed. *Id.*

¶32 Here, the drive-by shooting was the ultimate charge, as the most serious one. The jury found both N. and M. were victims of Cañez's drive-by shooting. The evidence showed that Cañez fired twice, hitting N., and then fired an additional three or four shots after N. and M. ran to hide behind the truck. Only one shot was necessary to establish drive-by shooting and Cañez completed that offense when he fired the first shot at N. *See* A.R.S. § 13-1209(A); *State v. Siner*, 205 Ariz. 301, ¶ 12, 69 P.3d 1022, 1025 (App. 2003). After subtracting that shot, sufficient evidence remains based on the subsequent shots Cañez fired at both N. and M. to establish aggravated assault. Additionally, Cañez could have committed the drive-by shooting without aggravated assault of M. if he had not fired the remaining shots. *Cf. State v. Miranda*, 198 Ariz. 426, ¶ 17, 10 P.3d 1213, 1217 (App. 2000) (consecutive sentences imposed for three counts of disorderly conduct where each of three shots constituted separate act). And each

additional shot increased the risk of harm. Thus, the trial court correctly imposed consecutive sentences for the offenses of drive-by shooting and aggravated assault of M.

Conclusion

¶33 For the foregoing reasons, we affirm Cañez's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge